that the "District of Columbia and the territories are not states, within the judicial clause of the Constitution giving jurisdiction in cases between citizens of different states;" nor within Sec. 709 R. S., permitting writs of error from the Supreme Court where the validity of a *state* statute is in question; but they are "states as that word is used in treaties with foreign powers, with respect to the ownership, disposition, and inheritance of property."

Section 1 of the "Act to Regulate Commerce," February 4, 1887, c. 104, 24 St. 379, 3 Comp. St. 1901, p. 3154, and Section 3, of the Anti-Trust Act, July 2, 1890, c. 647, 26 St. 209, 3 Comp. St. 1901, p. 3201, apply to commerce between the states and territories, as well as "among the states." In view of the foregoing diversity of opinion of the extent of the power of Congress under the "Commerce Clause," it is uncertain whether these sections are valid or not.

RIGHT OF COURT TO INSTRUCT UPON THE FAILURE OF DEFENDANT TO TESTIFY IN A CRIMINAL ACTION.—The Court of Appeals of Kentucky has recently delivered a somewhat peculiar and novel opinion, relating to the right of the court to give an instruction based upon the failure of a defendant to testify in a criminal action. The defendant was charged with a felony and did not testify in his own behalf. The trial judge, without request, instructed the jury, that they should not comment upon such failure to testify, nor should they draw any presumption of guilt therefrom. This instruction was held to be reversible error. *Tines* v. *Commonwealth* (1903), 77 S. W. Rep. 363.

The Criminal Code of Kentucky, Sec. 223, provides that the failure of a defendant to testify in his own behalf, "shall not be commented upon, or be allowed to create any presumption against him." In holding the instruction erroneous, the court, citing no authority, says:—"The jury's mind was thus directed to the fact that appellant had not testified in his own behalf, and no comment by the commonwealth's attorney could have been more injurious to his interest than this instruction. The court, by the instruction in question, did the appellant the very injury which it is the object of the law to prevent. Appellant was entitled to absolute silence on his failure to testify in his own behalf." Only two cases seem to have gone to the limit of holding that the trial judge must keep absolutely silent on this subject. In *State* v. *Robinson*, 117 Mo. 649, 23 S. W. 1066, and *State* v. *Pearce*, 56 Minn. 226, 57 N. W. 652, the defendants requested the instructions, which were refused because the statutes of these states expressly forbade not only the attorneys but the courts from commenting upon or considering the failure to testify. But in Kansas, under a statute identical with those of Missouri and Minnesota, a different conclusion has been reached. DOSTER, J., in a recent well-considered and logical opinion, says that the statute was made for the purpose of protecting the rights of the defendant, and means that there shall be no consideration to his prejudice. He points out that in the absence of any instruction as to the duty of the jury under the law, they might consider the failure and comment upon it to the prejudice of the defendant. *State* v. *Goff*, 62 Kan. 104, 61 Pac. 683. This latter point, which is certainly very important, has been lost sight of by the Kentucky court, as well as by those of Missouri and Minnesota. In *Sullivan* v. *State*, 9 Ohio Cir. Ct. 652, the court says:—"If the court, *sua sponte*, were to charge the jury to do what the law requires

them to do, it could hardly be deemed prejudicial to the defendant." The statutes of Nebraska and Ohio are practically the same as that of Kentucky. The case of *Ferguson* v. *State*, 52 Neb. 432, 72 N. W. 590, is on all fours with the principal case, no request for the charge having been made. The court says—"When a prisoner is not sworn it is the duty of the court to inform the jury, if requested to do so, that they are not to draw any inference of guilt from the fact that he did not testify. If the jury in the case at bar had not been so directed, they might have regarded as a criminating circumstance the fact that he had not been sworn. The instruction, instead of being prejudicial to the accused, was favorable to him." In *Sullivan* v. *State*, 9 Ohio Cir. Ct. 652, another case directly in point, the court, favoring the instruction, says: "It is known to every one, that when a person is charged by the testimony of others with saying or doing something which by his own testimony he could successfully contradict or explain, and without apparent reason therefor he remains silent, the inference is very strong that he cannot honestly contradict or explain the evidence against him. Yet in such a case the law makes it the duty of the jurors to disregard the presumption which thus arises. And it would seem not to be in contravention of the spirit of the statute if the judge . . . should instruct them as to what the law requires of them in such cases." In the following decisions it has been held that the charge must be given if requested: *Farrell* v. *People*, 133 Ill. 244, 24 N. E. 423; *State* v. *Landry*, 85 Me. 95, 26 Atl. 998. But the court is not bound to give the charge in the absence of a request, although it is proper for him to do so. *Felton* v. *State*, 139 Ind. 531, 39 N. E. 228; *Matthews* v. *People*, 6 Col. App. 456, 41 Pac. 839; *Torey* v. *State*, 41 Tex. Cr. App. 543, 56 S. W. 60. The decision of the Kentucky court seems to be supported neither by reason nor authority.

THE LAST OF THE KENTUCKY BANK CASES, AND THE RELATIONS BETWEEN THE STATE AND FEDERAL COURTS.—A very remarkable case of intricate and protracted litigation has just been brought to a conclusion by the decision of the United State Supreme Court in *Deposit Bank of Frankfort* v. *Board of Councilmen of the City of Frankfort* (1903), 24 Sup. Ct. Rep. 154. It is the last and most interesting survivor of a group of cases which for ten years have been making the rounds of the state and federal courts, involving, all told, at least twenty-eight appeals in the Court of Appeals of Kentucky, six appeals from that court to the Supreme Court of the United States, twelve or more adjudications in the United States Circuit Court, one appeal to the United States Circuit Court of Appeals, and at least five appeals from the federal Circuit Court to the Supreme Court of the United States. The Kentucky Court of Appeals has at different times been on each side of the main federal question involved, and the United States Supreme Court has accomplished the feat of being, with a very fair show of consistency, on *both sides* at the *same time*, as will appear in the following summary of the proceedings so far as they concern the principal case.

In 1887 the Deposit Bank of Frankfort, in common with other Kentucky banks, under an act of the state legislature known as the "Hewitt Act," voluntarily assumed the payment of certain designated taxes upon its capital